

CHEW SIN LENG CONSTRUCTION CO.

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v.

COSY HOUSING DEVELOPMENT PTE. LTD.

COURT OF APPEAL, SINGAPORE

TS SINNATHURAY J

FA CHUA J

b

AP RAJAH J

[CIVIL APPEAL NO. 15 OF 1986]

6 NOVEMBER 1987

CONTRACT: *Building contract - Certificate of final payment - Whether within meaning of Clause as in contract - Defects in building - Whether certificate conclusive - Adducing in evidence affidavits at appeal stage.*

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In this case, the appellants who are building contractors had entered into a contract with the respondents who are housing developers, for the construction of 20 units of condominium housing. Pursuant to the contract, the Architects for the project issued two certificates of payment of the first being for \$50,000 and the other purporting to be Certificate of Final Payment for \$277,041.05. The respondent paid the appellants the total sum of \$40,000 towards the first certificate but made no payment in respect of the other certificate. The plaintiffs commenced legal proceedings against the defendants claiming for the sum of \$277,041.05 being balance of the monies due under the two certificates. Pursuant to the claim, the appellants took out an O. 14 RHC summons for final judgment. The respondents contested the O. 14 summons on the grounds that there were many issues in dispute which should be resolved through arbitration as provided for in the contract and applied to have all proceedings stayed pending arbitration.

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The learned Deputy Registrar dismissed the respondents' application for a stay and gave the appellants leave to sign final judgment. The respondents appealed against this decision and on appeal Thean J set aside the learned Deputy Registrar's Order and stayed all proceedings pending arbitration. Hence this appeal.

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The points before the Court of Appeal were:

1. Whether in the circumstances of this case the Certificate of Final Payment was within the meaning of Clause 30(6) of the contract;
2. Whether the said Certificate was conclusive, there being defects.

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Before the hearing of the appeal the appellants obtained leave of the Court of Appeal to adduce in evidence affidavits of their solicitor and the project architect.

Held:

[1] On the first point, the evidence as emerged from the two affidavits admitted in this appeal should be accepted as had these affidavits, particularly that of the Architect, been before the learned appeal Judge he would not have set aside the learned Deputy Registrar's order.

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[2] On the second point, the defects relied on are those which the purchasers raised with the respondents and these were not the defects contemplated by the relevant provision of the Contract.

[Appeal allowed.]

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For the appellants - M. Karthigesu (Rubin with him)

For the respondents - Kan Ting Chiu

*a***JUDGMENT****TS Sinnathuray J, FA Chua J, AP Rajah J:**

The plaintiffs (appellants) are a company incorporated in Singapore and they carry on the business of building contractors. The defendants (respondents) are also a Singapore company and they are housing developers.

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On 11 May 1983 the plaintiffs and the defendants entered into a contract (the contract) whereby the plaintiffs agreed to carry out and complete the construction of 20 units of condominium housing at a reserve road of Jalan Haji Salam, Singapore for a sum of \$1,550,000 on and subject to the terms therein contained and to the conditions annexed thereto (the conditions). The architects for the project are A.D. Consortium ('the architects') and Construction Cost Surveyors are the quantity surveyors ('the quantity surveyors').

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Pursuant to the contract the architects issued two certificates of payment the first being No. 11 dated 10 January 1985 for \$50,000 and the other purporting to be a Certificate of Final Payment for \$277,041.05 dated 18 July 1985. In January and April 1985 the defendants paid the plaintiffs the total sum of \$40,000 towards Certificate No. 11 but made no payment in respect of the other Certificate. It was in these circumstances that the plaintiffs commenced legal proceedings against the defendants for the sum of \$277,041.05 being the balance of the monies claimed to be due from the defendants to the plaintiffs under the said two Certificates.

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In furtherance of their claim the plaintiffs took out an O. 14 summons for final judgment. The defendants on the O. 14 summons claimed that there were many issues in dispute, the main ones being:

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(i) A claim for liquidated damages for delay and the proper computation of the period of extension caused by exceptionally inclement weather;

(ii) Who should bear the fees of the mechanical and electrical engineers appointed;

(iii) The price and extent of additional work carried out by the plaintiffs;

(iv) The price of work that the plaintiffs have failed to carry out;

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(v) Deduction for poor quality material and bad workmanship supplied by the plaintiffs.

They therefore claimed that there was a genuine outstanding dispute between the plaintiffs and the defendants which should be resolved through arbitration, as provided for in the contract and applied to have all proceedings stayed pending arbitration.

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It will be convenient here to set out Clauses 30(6) and 30(7) of the conditions which read:

30(6) So soon as is practicable but before the expiration of 3 months from the end of the Defects Liability Period stated in the appendix to these Conditions or from completion of making good defects under Clause 15 of these Conditions or from receipt by the Architect of the documents referred to in para. (b) of subclause (5) of this Conditions, whichever is the latest, the Architect shall issue the Final Certificate. The Final Certificate shall state:

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(a) The sum of amount paid to the Contractor under Interim Certificates and the amount named in the said appendix as Limit of Retention Fund and

(b) The Contract Sum adjusted as necessary in accordance with the terms of these Conditions, and the difference (if any) between the two sums shall be expressed in the said certificate as a balance due to the Contractor from the Employer or to the Employer from the Contractor as the case may be. Subject to any deductions authorised by these Conditions,

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the said balance as from the fourteenth day after presentation of the Final Certificate by the Contractor or as the case may be as from the fourteenth day after issue of the Final Certificate shall be a debt payable by the Contractor to the Employer.

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30(7) Unless a written request to concur in the appointment of an arbitrator shall have been given under Clause 34 of these Conditions by either party before the Final Certificate has been issued or by the Contractor within 14 days after such issue, the said certificate shall be conclusive evidence in any proceedings arising out of this Contract (whether by arbitration under Clause 34 of these Conditions or otherwise) that the Works have been properly carried out and completed in accordance with the terms of this Contract and that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made to the Contract Sum, except and in so far as any sum mentioned in the said certificate is erroneous by reason of:

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- (a) Fraud, dishonesty or fraudulent concealment relating to the Works, or any part thereof, or to any matter dealt with in the said certificate; or
- (b) Any defect (including any omission) in the Works, or any part thereof which reasonable inspection or examination at any reasonable time during the carrying out of the Works or before the issue of the said certificate would not have disclosed; or
- (c) Any accidental inclusion or exclusion of any work, materials goods or figure in any computation or, any arithmetical error in any computation.

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The learned Deputy Registrar dismissed the defendant's application for a stay and gave the plaintiffs leave to sign final judgment. The defendants appealed against the Registrar's refusal for a stay and it was this appeal that was heard by Thean J when he set aside the learned Deputy Registrar's Order and stayed all proceedings pending arbitration. In his judgment the learned appeal Judge said:

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Mr. Kan challenged that the second certificate is in truth a final certificate within the meaning of Clause 30(6) of the Conditions. This point as raised by Mr. Kan is not without substance. A certificate to be a final certificate under Clause 30(6) of the Conditions must state the sum already paid to the plaintiffs, the adjusted contract sum and the difference between the said two sums to be paid by the defendants to the plaintiffs, or by the plaintiffs to the defendants, as the case may be. The second certificate issued by the Architects falls far short of such requirement and in my view is not a final certificate under Clause 30(6) of the Conditions, and therefore Clause 30(7) has no application.

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The plaintiffs appealed against the judgment of Thean J and the appeal was heard by us. We allowed the appeal and restored the Deputy Registrar's order. Ground 4(d) of the plaintiffs' petition of appeal reads:

- (d) in holding that the second certificate dated 18 July 1985 and entitled 'certificate of final payment' did not comply with the requirements of Clause 30(6) of the Contract and therefore was not a final certificate within the meaning of Clause 30(6) of the Contract without giving the Contractor's Counsel an opportunity to explain as this point was taken for the first time by the Developer's Counsel during the arguments before the Judge. The document exhibited in the affidavits had not enclosed the attachment to the 'certificate of final payment'.

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Arising from this, the petition of appeal prayed for leave of the Court of Appeal for the plaintiffs to adduce in evidence affidavits of their solicitor, Mr. David Chang Kah Kiat, the project architect, bespeaking what in fact and in truth the architect had submitted to the developer. Before the hearing of the appeal the plaintiffs (appellant) obtained leave of the Court of Appeal to adduce in evidence the said affidavits.

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- a* The relevant parts of the project architect's affidavit dated 17 June 1986 reads as follows:
- (2) On or about 26 March 1986, my firm received a letter dated 26 March 1986 from Messrs Shyam & Chew, the solicitors for the plaintiffs in this action. In that letter, Messrs Shyam & Chew sought clarification from us on the Certificate of Final Payment dated 18 July 1985 issued by my firm and the Statement of Final Account. A copy of the said letter is now produced, shown to me and marked 'DC-1';
- b* (3) I then replied on 26 March 1986 itself to Messrs Shyam & Chew, stating that when we forwarded the Certificate of Final Payment to the owners (i.e., the defendants herein), the Statement of Final Account was not attached thereto due to an oversight on our part but immediately after the discovery of that oversight, we sent the Statement of Final Account the next day i.e., on 19 July 1985 to the defendants with the intent that both the documents viz the Certificate of Final Payment and the Statement of Final Account are to be read as one document. A copy of my said letter dated 26 March 1986 (together with the enclosures)
- c* addressed to Messrs Shyam & Chew is now produced, shown to me and marked 'DC-2'.

The points for decision in the appeal, in our view, were (1) whether in the circumstances of the instant case the Certificate of Final Payment dated 1 July 1985 was a final certificate within the meaning of Clauses 30(6), and (2) whether even if the said Certificate was a final architect under Clause 30(6), it is not conclusive at least in one aspect, there being defects falling within exception (b) to Clause 30(7).

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- On the first point we accepted the evidence as emerged from the two admitted affidavits. We were of the view that had these affidavits, particularly that of the architect, been before the learned appeal Judge he would not have set aside the learned Deputy Registrar's order. On the second point we accepted the submission of the appellants' Counsel that the defects relied on are those which the purchasers of the units have raised with the developer and these are not the defects contemplated by this provision. One must look at the Contract between the developer and the contractor and not at any contract between the developer and the purchasers of the units. We accordingly allowed the appeal.
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Also found at [1988] 1 CLJ 413

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